



January 30, 2001

Ms. Michele L. Shackelford  
General Counsel  
Texas State Board of Medical Examiners  
P.O. Box 2018  
Austin, Texas 78768-2018

OR2001-0355

Dear Ms. Shackelford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143742.

The Texas State Board of Medical Examiners (the "board") received a request for the following information pertaining to a specified physician:

- (1) the names of any and all physicians approved by the board to act as surgical consultants or surgical assistants as required by the board's May 1995 order;
- (2) copies of any and all reports from any monitoring physicians;
- (3) a copy of the entire compliance file;
- (4) copies of all correspondence to or from the board regarding [the physician's] compliance with the board's May 25, 1995 order; [and]
- (5) all correspondence from the board regarding approval or denial of assisting and consulting physicians.

You explain that the board maintains a "Compliance File" on the specified physician which contains the information responsive to the request. You state that the board will provide to the requestor some of the requested information. As to the remaining information, you claim that this information is excepted from disclosure under section 552.101 in conjunction with various statutes and section 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You explain that pursuant to its disciplinary authority, the board may require a physician to practice under the direction of a physician designated by the board for a specified period. *See* Occupations Code § 164.001(b)(7). Pursuant to section 164.010 of the Occupations Code, the board shall adopt a system to monitor the compliance of physicians who are subject to disciplinary action and who present a continuing threat to the public welfare through the practice of medicine. You inform us that the physician who is the subject of this request was ordered by the board to be assisted in all surgical procedures by an assisting physician and to have his practice records “retroactively reviewed” by an approved monitoring physician.

You assert that the reports of monitoring physicians in Attachment B, the names of approved assisting physicians and monitoring physicians in Attachment C, investigative reports in Attachment D, and correspondence regarding compliance in Attachment F are excepted under section 552.101 in conjunction with sections 160.005 and 160.006 of the Occupations Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by statute. You assert that the information is peer review information under section 160.003(b) of the Occupations Code. Section 160.003 provides in relevant part:

(a) This section applies to:

...

(2) a physician licensed in this state or otherwise lawfully practicing medicine in this state[.]

...

(b) A person or committee subject to this section shall report relevant information to the board relating to the acts of a physician in this state if, in the opinion of the person or committee, that physician poses a continuing threat to the public welfare through the practice of medicine.

Occupations Code § 160.003(a)(2), (b). Section 160.005(a) of the Occupations Code provides that a report made under this subchapter is confidential and section 160.006(a) of the Occupations Code provides that a report received and maintained by the board under this subchapter is confidential. However, we do not believe that the submitted reports are the type of reports contemplated in section 160.003(b) and made confidential by sections 160.005 and 160.006. Section 160.003(b) imposes a duty on all physicians to report to the board a physician that poses a continuing threat to the public welfare through the practice of medicine. The submitted information has been given to the board pursuant to the monitoring procedures set forth by the board under section 164.010 of the Occupations Code. Accordingly, we conclude that the monitoring reports, the names of assisting physicians and

monitoring physicians, the investigative reports, and the compliance correspondence are not the type of information that is confidential under sections 160.005 and 160.006, but rather monitoring information provided to the board pursuant to its disciplinary authority under Chapter 164 of the Occupations Code. Therefore, you may not withhold Attachments B, C, D, and F under section 552.101 in conjunction with sections 160.005 and 160.006.

You also assert that correspondence regarding the approval and denial of assisting and monitoring physicians in Attachment C, intragency investigative reports in Attachment D, interagency compliance division reports in Attachment E, and board reports in Attachment I are excepted under section 552.101 in conjunction with section 164.007(c) of the Occupations Code. Section 164.007(c) provides the following:

(c) Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder.

Occupations Code § 164.007(c). The information in Attachments C, D, and E pertain to the physician's probation and compliance status. We believe that section 164.007(c) applies only to investigatory records gathered by the board during the pre-hearing stage. We do not believe that section 164.007(c) applies to compliance information maintained by the board pursuant to section 164.010 of the Occupations Code which provides for the board to monitor a physician's compliance with the probation conditions. We note that section 164.010 does not contain a confidentiality provision similar to that found in section 164.007(c). Therefore, we conclude that Attachments C, D, and E are not excepted under section 552.101 in conjunction with section 164.007(c) of the Occupations Code.

However, we conclude that Attachment I is excepted under section 164.007(c) of the Occupations Code. You explain that Attachment I contains intragency reports regarding malpractice, complaint, and disciplinary history on many physicians whose names were presented as potential assisting or monitoring physicians. Therefore, we conclude that Attachment I constitutes investigative information possessed by the board relating to a license holder. Accordingly, you must withhold Attachment I under section 552.101 in conjunction with section 164.007(c) of the Occupations Code.

You claim that Attachment H contains information and communications of reports made by the board to the National Practitioner Data Bank which are confidential under section 552.101 of the Government Code in conjunction with provisions of the federal Health Care Quality Improvement Act of 1986 (the "HCQIA"), 42 U.S.C. § 11101 *et seq.* The federal law provides for the reporting of a variety of information pertaining to physicians and

other licensed health care practitioners. *See* 42 U.S.C. §§ 11131-11133. Under section 1132 of title 42, each Board of Medical Examiners is required to report disciplinary actions relating to a physician's professional competence or conduct. Section 11137 provides in relevant part:

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential . . .

42 U.S.C. § 11137(b)(1). Section 11137(b)(2) prescribes a civil monetary penalty for a violation of section 11137(b)(1). You do not advise us, and we are not aware, of any law, regulation, or exception to section 11137(b)(1) under which the information in question may be made available to the requestor. Accordingly, you must withhold Attachment H from disclosure under section 11137(b)(1) of title 42 of the United States Code.

You also assert that Attachments E and G are attorney work product that are excepted under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)). The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *See id.* (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991); *see also Leede Oil & Gas*,

*Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.–Houston [1st Dist.] 1990, no writ)(the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a “neutral recital” of facts).

Although you state that “the physicians have been involved in on-going litigation with the Board since 1995 through October, 2000,” you do not explain the current status of this litigation. The documents reveal that there was litigation between the board and the physician, but that the physician’s appeal of the board’s order was denied by the Texas Supreme Court on December 4, 1997. The submitted records in Attachment E and some of the records in Attachment G were created after the court denied the appeal and pertain only to the physician’s compliance with the probation terms. However, some of the submitted information in Attachment G was created before the litigation concluded.

With regard to the information created before December 4, 1997, we have marked the information in Attachment G that reveals the mental processes, conclusions, and legal theories of the attorney and may be withheld under section 552.111. However, the remaining factual information in Attachment G may not be withheld under section 552.111 of the Government Code. For the information created after December 4, 1997, you have not demonstrated that this information was created for trial or in anticipation of litigation. Accordingly, you may not withhold this information under section 552.111.

In conclusion, you must withhold Attachments H and I under section 552.101 of the Government Code. Further, you may withhold the marked information in Attachment G under section 552.111 of the Government Code. You must release the remaining submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

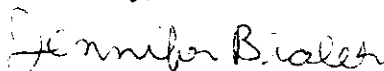
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek  
Assistant Attorney General  
Open Records Division

JHB/er

Ref: ID# 143742

Encl: Submitted documents

cc: Mr. Robert H. Kidd, IV  
1001 McKinney, 18<sup>th</sup> Floor  
Houston, Texas 77002  
(w/o enclosures)